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IN THE

Supreme Court of the United States

Supreme Court, U.S.
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No. 70-5012

GEORGE WILLIAM MILTON,

Petitioner,

v.

LOUIE L. WAINWRIGHT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit (A. 34-36; R. Vol. II, Doc. #3) is reported at 428 F.2d 463. The opinion of the U.S. District Court for the Southern District of Florida, Miami Division (A. 25-32; R. 142-150) is reported at 306 F. Supp. 929.[1]

[1] The numerous prior decisions involving this case will be referred to in the Statement, History of the Case, *infra.*

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1970 (A. 37; R. Vol. II, Doc. #4), and Petitioner's timely petition for rehearing was denied July 16, 1970 (A. 38; R. Vol. II, Doc. #5). The petition for a writ of certiorari was filed August 13, 1970, and was granted on June 7, 1971, 403 U.S. 904. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth Amendment, United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Fifth Amendment, United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment, United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have

been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Section 1, Fourteenth Amendment, United States Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 901.23, Florida Statutes Annotated (Sec. 901.23, Florida Statutes 1957; Laws 1939, c. 19554, Sec. 23):

"An officer who has arrested a person without a warrant shall without unnecessary delay take the person arrested before the nearest or most accessible magistrate in the county in which the arrest occurs, having jurisdiction, and shall make before the magistrate a complaint, which shall set forth the facts showing the offense for which the person was arrested; or, if that magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county."

Section 901.24, Florida Statutes Annotated (Sec. 901.24, Florida Statutes 1957; Laws 1939, c. 19554, Sec. 24):

"Any attorney at law entitled to practice in the courts of this state shall, at the request of the person arrested or of some one acting in his behalf, be permitted, forthwith upon his request, to visit the person arrested and to interview him privately."

QUESTIONS PRESENTED

1. Are the Sixth Amendment right-to-counsel protections as construed in *Massiah v. United States*, 377 U.S. 201 (1964), proscribing confessions extracted by design from an accused in the absence of his counsel after indictment, to be given only limited, prospective application, or do they apply through the 14th Amendment to a 1958 State capital case?

2. Where the State contrives, after an indictment for first degree murder, to interrogate the accused in the absence of his counsel by placing a police officer in his cell disguised and posing as another prisoner, and where the officer then prods, probes and questions the accused, using psychological techniques to make him talk, and overcomes after 12 to 18 hours the accused's repeatedly expressed wish not to talk about his case, is the resulting confession, when considered in the light of the totality of the circumstances preceding it, a free and voluntary confession under the 14th and 5th Amendments to the United States Constitution?

STATEMENT

A. History of the Case.[2]

On November 24-26, 1958, Petitioner was tried by jury and convicted of first degree murder, with recommendation of mercy, in the Florida Circuit Court, Eleventh Judicial Circuit, Dade County, Miami, Florida (T. 650-653). He was sentenced to life imprisonment on December 12, 1958 (R. 2).

[2]References to the printed Appendix will be made by the letter A (e.g., A. 15); to the original Record in this Court by the letter R (e.g., R. 15); and to the pages of the original Florida trial court transcript, which is an exhibit in this Record (R. 156), by the letter T (e.g., T. 15).

Petitioner's appeal to the Florida District Court of Appeal, Third District, of his original conviction was dismissed without review on the merits, *Milton v. State*, 121 So. 2d 496 (Fla. App., 3rd Dist., 1960), apparently because Petitioner escaped during the pendency thereof. See *Milton v. Cochran*, 147 So.2d 137 (Fla. 1962) at p. 137. Petitioner was quickly returned to custody, filed a petition for writ of certiorari with the Florida Supreme Court; and this too was denied without opinion or review on the merits. *Milton v. State*, 125 So.2d 880 (Fla. 1960).

Thereafter Petitioner brought a series of collateral attacks on his judgment of conviction. Apparently he first filed a habeas corpus petition with the Florida Supreme Court. That Court issued the writ, heard oral argument, and then discharged the writ in an opinion reported as *Milton v. Cochran*, 147 So.2d 137 (Fla. 1962), cert. den., 375 U.S. 869 (1963).[3]

During Petitioner's trial the State contended that Petitioner had voluntarily confessed the alleged murder on five separate occasions. All five alleged confessions were admitted into evidence against him. *Milton v. Cochran, supra*, involved an attack on the voluntariness of the first four confessions.

In 1965 Petitioner filed a motion under Florida Criminal Procedure Rule 1 (now Fla. Cr. P. Rule 1.850, 33 Fla. Stats. Anno., Rule 1.850, p. 452) seeking to vacate his judgment of conviction and sentence (R. 4). This was denied by the original trial Judge on July 12, 1965 (R. 4). Appeal from this denial was dismissed without opinion on January 13, 1966. *Milton v. State*, 181 So.2d 751 (Fla. App., 3rd Dist., 1966). A second petition for habeas corpus to the Florida Supreme Court was denied without a hearing or opinion on March 3, 1966. *Milton v. State*, 188

[3]The fact that Petitioner had escaped for a time during his appeal was deemed not to preclude his collateral attack. 147 So.2d at 138. Mr. Justice Douglas dissented from the denial of certiorari in the *Cochran* case. 375 U.S. 869.

So.2d 312 (Fla. 1966). The grounds of these attacks do not clearly appear in this Record and are not reflected in the reported decisions, but it appears from the petition in this case that the grounds concerned the admissability of the fifth confession, rather than the first four, as being coerced and involuntary (A. 7-9; R. 5; see 396 F.2d at 215). Petitioner was not represented by counsel in these proceedings (A. 9-10; R. 6).

Petitioner next filed a petition for writ of habeas corpus on February 24, 1967, with the U.S. District Court for the Middle District of Florida, which was transferred to the U.S. District Court, Southern District of Florida (R. 74, 10). This petition, which clearly attacked the fifth confession and the way it was obtained, was denied without holding an evidentiary hearing but upon review of the State trial record, in an unreported opinion dated September 15, 1967, and filed September 19, 1967 (A. 14-19; R. 75-86, 10). The District Court held that the methods used by the State in obtaining the fifth confession "comported fully with the requirements of due process" (A. 19; R. 86).

On appeal the Court of Appeals for the Fifth Circuit expressed "grave doubts" as to the Constitutional validity of the methods used by the State but affirmed on June 5, 1968, in an opinion stating that the affirmance was not for the reasons given by the District Court below and was not a ruling on the intrinsic merits of Petitioner's claims (A. 12, 11-13; R. 17, 14-18). Instead, the Court of Appeals affirmed because Petitioner had not presented the particular factual contentions currently raised to the Florida Sentencing Court and had thus not exhausted an available State post-conviction remedy. *Milton v. Wainwright*, 396 F.2d 214 (5 Cir. 1968). The affirmance was without prejudice to Petitioner's reapplying for relief in the Florida Sentencing Court. 396 F.2d at 215 (A. 13).

Petitioner promptly filed the suggested Florida Rule 1 motion with the Florida Sentencing Court on July 25, 1968 (R. 11). The motion was denied without a hearing

or opinion on September 3, 1968 (R. 20). In a further effort to exhaust all State remedies Petitioner then filed a habeas corpus petition on May 8, 1969, with the Florida Supreme Court, but that petition was returned by the Chief Justice by letter dated May 15, 1969, refusing to docket the petition (R. 22, 11).

This present federal habeas corpus case was then commenced in the U.S. District Court, Southern District, Florida, on June 11, 1969. The District Court ordered an evidentiary hearing and appointed counsel for Petitioner (R. 56-58).[4] At the hearing, however, counsel for Petitioner and State stipulated (A. 19-24; R. 97-107) that no additional evidence was needed and that the case could be determined on the basis of the facts stated in the U.S. Court of Appeals' prior opinion, 396 F.2d 214 (which appears at A. 11-13; R. 14-18), and on the facts appearing in the original State trial transcript, which was made an exhibit (A. 33; R. 156). Accordingly, no fresh evidence was taken in the District Court below and the hearing was confined to a recitation of the case's history (R. 72-98), counsels' stipulation (A. 19-24; R. 97-107), and oral argument (R. 107-139).

On November 6, 1969, the District Court rendered its decision (A. 25-32; R. 142-150) denying the petition on the basis that the State court transcript showed Petitioner's fifth confession to be "freely and voluntarily given" albeit obtained by methods proscribed by the Sixth Amendment as determined in *Massiah v. United States*, 377 U.S. 201 (1964). The Court declined to apply *Massiah* "retroactively" to this 1958 conviction and construed *Powell v. Alabama*, 287 U.S. 45 (1932), an earlier right-to-counsel case, as inapposite (A. 30-31; R. 148-150). 306 F.Supp. 929. The U.S. Court of Appeals affirmed per curiam on June 23, 1970 (A. 34-36; R. Vol. II, Doc. #3), 428 F.2d 463.

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[4]Petitioner objected to court-appointed counsel and sought to have the evidentiary hearing held in the State Court (R. 59-65). These contentions were denied (R. 66-67).

B. Statement of the Facts

Petitioner in 1958 was a 23 year old Negro (A. 55; T. 322, 104, 609) who worked as a porter in a Miami Beach hotel (A. 89; T. 380), had ambitions to be a boxer (T. 308, 424; R. 142), and was living in a rooming house in the "Negro area" of Miami (T. 481, 69, 200, 294-295) with a pregnant woman (T. 304, 79) he regarded as his wife (T. 313, 304, 480, 483). He had never before been jailed or interrogated by the police (A. 133, 55; T. 464, 322, 492). He was from Mississippi where he had dropped out of school during the sixth grade (A. 134; T. 466).

In the early morning hours of June 1, 1958, Petitioner while operating a used car he had purchased a few hours earlier for $99.00, went into the Miami River (T. 217-222, 480-483, 91-120, 157-158). The only other person in the car was his wife; she was killed by drowning (T. 76-84, 157-162). Petitioner was hauled from the river by a nearby boat captain (T. 91-120). He was hurt and incoherent (T. 103, 480-483, 592, 492-493).

Officer McGraw of the Miami Police Department questioned Petitioner briefly at the scene (T. 145-155). Petitioner was then taken to the hospital in an ambulance (T. 153, 123, 149), where he was again questioned by Detective Shepherd of the Miami Police Department and Officer McGraw while lying on a stretcher in the colored side of the emergency room (T. 124-130, 125, 129, 149). The following day, June 2, 1958, Petitioner was taken from the hospital, with his shoulder in a sling (T. 492), and placed in the City Jail in a solitary 4-by-6 foot cell without windows and with a solid metal door (A. 122-123; T. 444-446).

For the next 17 days (June 2 - June 19, 1958) the police held Petitioner incommunicado in this isolated cell and in the County Jail without benefit of counsel, without advising him of any charge against him, and without taking him before a magistrate (A. 122-134, 57; T. 444-448, 431, 465, 325). Petitioner tried to call "my wife's folks" and his family but was not allowed to make telephone calls (A. 133-

134, 57; T. 465, 325). He received no visitors (A. 134; T. 465). See *Milton v. Cochran*, 147 So.2d 137, 138 (Fla. 1962), where the Florida Supreme Court reviewed this trial record and warned that if the procedures followed in this case were not halted, a *McNabb* type of rule would have to be adopted or imposed.[5]

During this period from June 1 to June 19, 1958, Petitioner's only contact was with the police. On June 3, 1958, he was taken from his cell at 6:30 a.m., brought to an interrogation room, shot in the arm with truth serum, and questioned by a Ph.D. psychologist and an M.D. psychiatrist with Detective Holmes of the Miami Police Department present (A. 112; T. 426-428, 556-559, 448-449, 476-477, 339, 365-366). The record does not reflect what Petitioner then said except that he apparently did not confess to murder (A. 112; T. 427-428). Detective Holmes testified he always "on any occasion" warned Petitioner about his Constitutional rights (A. 115, 110; T. 432, 423) and that Petitioner "desired" the truth serum to be administered (A. 112; T. 427). Petitioner later claimed in July, 1958, that he had been "forced" or "made" to take the serum (A. 80-81; T. 365-366, 346), and warned his cell-mate, a disguised policeman, not to take it (A. 65, 44; T. 339, 302).[6]

The following day, June 4, 1958, Petitioner was again removed from his cell by Detective Holmes, hooked up to "wires or gadgets" (A. 125; T. 449-450), and given a polygraph test (A. 144; T. 431). The record does not disclose what was then said except that again apparently no incriminating statements were made (A. 114; T. 431). Petitioner proffered proof, rejected by the Court, that this interrogation was involuntary (T. 558-559).

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[5]On May 25, 1971, the Florida District Court of Appeal, First District, noted that the warning in *Milton v. Cochran, supra*, had gone unheeded and adopted a *McNabb-Mallory* type of rule in *Jacobs v. State*, 248 So.2d 515 (Fla. App., 1st Dist., 1971).

[6]Petitioner described the truth serum procedure to his cell-mate as, "* * * they gave you a shot into your arm, or something. You lay down on the couch and you talk out of your head." (Officer Langford's testimony, A. 65; T. 339).

On June 5, 1958, Petitioner was further interrogated by Detective Shepherd and "consented" to the police searching his rooming house quarters (A. 98-99; T. 396-397). At this session, Detective Shepherd testified he warned Petitioner about his Fifth Amendment rights but not about his right to counsel, and apparently not about his Fourth Amendment rights (T. 403-404).

During the following days Petitioner was interrogated on various occasions (A. 98-100, 111-113; T. 398-399, 450, 486-488) he says almost daily and for long periods (A. 123-125, 139-142; T. 446-447, 478). Finally, on June 11, 1958, Petitioner was taken from his City Jail cell to an interrogation room which was equipped with recording devices (A. 92-95, 111; T. 506-507, 391, 386-391, 425) and a secret observation station behind a one-way mirror (T. 552, 386). There he was questioned by two detectives who worked in tandem, that is, one would question while the other was absent and *vice versa* and then the two would question together, etc. (A. 109-111, 125-131, 92-97; T. 473, 386, 390-391, 397-398, 506, 565, 425). The interrogation began about 5 p.m. (A. 109; T. 422-423, 550) and was not completed until the next morning about 1 a.m. (A. 147; T. 529, 583, 587).

The State's version is that the questioning was gentle, Petitioner was cooperative, and that about 9:30 p.m. (A. 95; T. 390) Petitioner—after being told his story was "baloney" (A. 115, 126; T. 566-568, 432-433, 452)—readily confessed to killing his wife deliberately (A. 92-96; 109-111, 115, 117-120; T. 385-393, 422-426, 432-433, 435, 518-534; 550-572). At this point, the State's evidence continues, Petitioner proposed "a sort of a little act"—a charade—to make his confession *appear* "voluntary" and "spontaneous" (A. 95-96, 119; T. 507-508, 524, 390-393, 404-405, 438-440). Petitioner was to step out of the room, knock on the door, say "hello" when it was opened, and tell the detectives he wanted to confess (A. 95-96, 119; T. 390-393, 507-508). The detectives testified they saw no reason not to accommodate Petitioner in this charade and in fact followed this

unprecedented procedure (A. 103, 119-120; T. 404-405, 438-439, 507-508).

The tape recording device in the interrogation room was manually operated and could be turned on and off from behind the one-way mirror (A. 111; T. 391, 425, 506-507). There was an apparent shortage of tape so the entire interrogation from its beginning was not recorded (A. 95; T. 391, 414, 506-507, 520), but the tape was turned on by the hidden detective behind the one-way mirror when Petitioner agreed to confess prior to the door-knocking charade and during the confession that followed (A. 95; T. 391, 507-508). This was the first confession and the tape recording was admitted into evidence and played to the jury over Petitioner's objection (T. 510-511, 581). The tape lasted one hour and three minutes (A. 108-109; T. 571, 414, 521) out of the eight hours that elapsed from the beginning of Petitioner's interrogation until its end.

Thereafter, a stenographer was summoned and a second confession was dictated (A. 96-97; T. 571-572, 393-394, 513, 521, 554). This also was admitted into evidence before the jury over Petitioner's objection (T. 588-594).

Petitioner was next stripped to the waist and photographed (A. 96; T. 394, 513-514). By this time, one of the detectives testified, Petitioner "seemed more concerned with pleasing us than anything else at the moment" (A. 147; T. 530), so the two detectives took their congenial prisoner to the hospital for examination by the Chief County Medical Examiner to show he had no bruises or marks of violence on his body (A. 97, 131; T. 394, 415-422, 583-588). The Medical Examiner, who had previously joined in the search of Petitioner's rooms (A. 98; T. 396), testified it was most unusual to be asked to examine a prisoner at midnight as he was asked to examine Petitioner (T. 419). Petitioner was then returned to the police office where he initialed and signed the dictated second confession in written form (A. 97, 132; T. 394, 514-516, 554-555).

Petitioner's evidence is that he was abused (A. 125-132; T. 458); threatened with being taken for "a ride out in the country" (A. 127; T. 453-460); threatened that "you are going to stay here a thousand years" (A. 126-127; T. 453); and subjected to a third-degree "heat" treatment (A. 129-130; T. 458-459, 473) until he finally agreed to do whatever the detectives asked him to do and "confessed" (A. 126-131; T. 451-466). As Petitioner described it, "Then, finally, well, they wasn't anything else I could do." (A. 130; T. 458).

There is no testimony from Petitioner concerning the next day, June 12, 1958. The State's evidence is that Petitioner requested to see a detective to change his confession of the prior evening (T. 534-535, 545). The detective agreed to allow this but asked that Petitioner first re-enact the fatal events of June 1, 1958 for him at the scene (T. 535, 546). Petitioner agreed, did so, and was photographed while so performing the re-enactment (T. 535-541, 546). The detective testified to this over Petitioner's objection before the jury (T. 535-541, 534), and this is the third confession.

Next Petitioner was taken from the scene of re-enactment to the police office where a fourth confession was dictated, transcribed and signed by Petitioner (T. 541-544). This fourth confession largely reaffirmed the second (T. 595-605). It was also admitted into evidence before the jury over Petitioner's objection (T. 588, 595-605).

Thereupon, having held Petitioner incommunicado since June 1, 1958, without benefit of counsel, and armed with four confessions, the police for the first time on June 13, 1958, made a formal charge by affidavit and obtained a warrant for Petitioner's arrest for first degree murder (T. 484-485, 489-491, 496-497, 406-407). Yet still Petitioner was held incommunicado. The arrest warrant merely resulted in his being transferred from City Jail to County Jail. It was not until June 19, 1958, that he was finally allowed to make a telephone call and get a lawyer (A. 57, 133-134; T. 325, 463-465). The lawyer promptly filed a

petition for habeas corpus (T. 406-409, 495-497, 503), and there followed a preliminary hearing before a magistrate on June 24, 1958 (A. 105-106; T. 408)—the first time since June 1, 1958, that Petitioner was taken before a State official other than a police officer. Petitioner was bound over by the magistrate to the Grand Jury (T. 3), and was indicted on July 1, 1958, for first degree murder (T. 1-2).

Petitioner remained in jail pending trial. On July 18, 1958, a Negro police officer, Archie Langford, was asked by a detective to perform a special detail (A. 86-87; T. 377-379, 375, 297-299). Officer Langford was instructed to pose as a prisoner and share Petitioner's cell (A. 88, 54; T. 375-379, 297-299, 316, 329). His purpose was to "seek information" from Petitioner (A. 54, 87-88; T. 320, 377).

Officer Langford entered Petitioner's cell, posing as a prisoner being held on a murder charge, between 7 p.m. and 8 p.m. on Friday, July 18, 1958 (A. 41-42; T. 298-299, 301, 314, 329). He testified that he had not received any briefing on the facts of Petitioner's case whatsoever (A. 54, 72-73; T. 320, 352-355). That evening Langford "tried to open him [Petitioner] up" (A. 76-77; T. 358-359), and even woke Petitioner up once during the night (A. 79; T. 362), but Petitioner refused to talk about his case (A. 76-77, 86, 59; T. 302, 314-315, 358-359).

The next morning and thereafter Officer Langford devoted his efforts to gaining Petitioner's confidence. He gave Petitioner his breakfast (A. 43, 80; T. 302, 331, 348) and fed him candy (A. 48; T. 310, 331). He talked convincingly about his own fake crime (A. 43-45, 60-61; T. 302, 305, 306-307, 309, 311, 315, 363-364). Langford found Petitioner to be easy to wake up and sensitive (A. 55; T. 321, 347), uneducated and unable to understand a lot of words (A. 83; T. 370). He tried to steer the conversation to Petitioner's offense (A. 45-48, 51, 53, 62, 67; T. 303-304, 305, 307, 317-318, 321, 334), but Petitioner repeatedly said he did not want to talk about it (A. 44, 45, 46, 64, 76-77; T. 303, 304, 307, 337, 358-359) and had been

told not to talk about it by his lawyer (A. 46, 47, 51; T. 306, 307, 308, 315). In fact, Petitioner had asked to be in a single cell so he could be by himself (A. 85; T. 373).

As psychological prompting techniques when Petitioner refused to talk, Officer Langford would accuse him of being "crazy," of being a "rape artist," of having raped his wife, would pretend to be mad, would talk about water and drowning, until Petitioner's head ached, while at the same time he would alternate acts of kindness by giving Petitioner his food and sharing candy bars he brought with him (A. 44-48, 50, 62, 64, 69, 70, 76, 80; T. 333-334, 302-304, 307, 310, 312-313, 316-318, 321, 331, 333-334, 338-340, 346, 348, 353, 355, 358).

Finally, after Langford had been in the cell some 12 to 18 hours (A. 52, 78; T. 316), Petitioner began to talk about his case, and during the early morning hours from midnight to 3 a.m. Sunday morning (A. 47, 44-45, 52-53, 86; T. 309-310, 307, 318, 344), as Officer Langford expressed it, "Then he broke down. * * * he began to tell me his story" (A. 47; T. 309). Thus, Petitioner "broke" after some 31 hours of pressure, prodding and prompting by his cell mate.

In all Langford testified he was in Petitioner's cell continuously from between 7 p.m. and 8 p.m. on Friday, July 18, 1958, until removed Sunday, July 20, 1958, between 4 p.m. and 5 p.m., except for one brief three-minute absence on Friday evening (A. 72, 75; T. 355-356, 301).

Petitioner's statements to Officer Langford constitute his fifth confession. It was the first one introduced into evidence before the jury over Petitioner's objection (T. 328-384). It was referred to repeatedly by the State in its final argument (T. 609, 620-621, 627, 628, 630).

SUMMARY OF ARGUMENT

Question I.

Factually and conceptually this case is indistinguishable from *Massiah v. United States*, 377 U.S. 201 (1964). In both cases the prosecuting Government set out, by design or by use of trickery, to extract evidence from an accused's own lips in the absence of his counsel at a stage when the judicial process had formally begun by indictment. If anything, Petitioner's case is a more aggravated deprivation of Sixth Amendment right-to-counsel protections because here there was the use not only of trickery and design, but forced association for 45 continuous hours and psychological coercion. There can be no doubt that if this were a current federal case, it would be squarely governed by *Massiah*.

Likewise, the fact that this is a state, rather than a federal case does not alter the full application of the Sixth Amendment protections construed in *Massiah*. At least in capital cases, the right of a defendant in state criminal proceedings to the "assistance of counsel for his defense" under the 14th and 6th Amendments has been recognized since *Powell v. Alabama*, 287 U.S. 45 (1932). *Powell* and later cases, e.g., *Townsend v. Burke*, 334 U.S. 736 (1948), and *Chandler v. Fretag*, 348 U.S. 3 (1954), make clear that this right is not limited to the trial alone, but includes the critical, pre-trial preparatory stage of the proceedings as well. And since *Gideon v. Wainwright*, 372 U.S. 335 (1963), there is no longer any distinction between the right-to-counsel enjoyed by a state court defendant and by his counterpart in federal court, even in non-capital criminal cases. The holding of this Court in *McLeod v. Ohio*, 381 U.S. 356 (1965), squarely establishes that the ruling in *Massiah* applies with undiluted force to state court cases. See also *People v. Flores*, 236 Cal. App.2d 807, 46 Cal. Rptr. 412 (1965).

The only question, then, is whether *Massiah* is to be afforded the normal, full effect of all the right-to-counsel

cases that preceded it, or whether it is to be treated specially, as certain later cases have been, and limited to prospective effect only. This involves the comparatively new Constitutional doctrine of "non-retroactivity."

Petitioner submits that the new doctrine of non-retroactivity comes into play only (a) when this Court arrives at a new Constitutional construction affecting criminal procedure which represents a definite, clear-cut change from past holdings or explicit dicta of this Court or from doctrine previously sanctioned by the virtually unanimous weight of authority of the overwhelming majority of American courts; (b) when the new Constitutional construction does not significantly involve the reliability or integrity of guilt determinations made in violation of its principles; and (c) when because of widespread reliance by state and federal law enforcement agencies on prior decisions of this Court or a multitude of lower courts in conducting their past business, retroactive application of the new construction would impose a staggering burden of retrials upon the state and federal governments.

None of these factors pertain to *Massiah*. *Massiah* overruled no prior decision, repudiated no prior dicta, overturned no overwhelming weight of authority. *Massiah* was clearly foreshadowed by *Powell v. Alabama, supra*, in 1932, and other cases, and was precisely anticipated by concurring opinions in *Spano v. New York*, 360 U.S. 315, 324-327 (1959). This clearly distinguishes *Massiah* from all the cases to which this Court has heretofore applied the doctrine of non-retroactivity.

Here, also, a review of the state court record shows that the deprivation of Petitioner's right-to-counsel inevitably affected the reliability and integrity of the finding of guilt, both as to its existence and its degree. Unlike violations of the 4th and 5th Amendments, deprivation of counsel after the judicial process has formally begun by indictment poses a clear danger of convicting the innocent. And finally, no widespread practice is here involved necessitating a multitude of retrials. Interrogation without counsel after

indictment, especially in capital cases, when the accused has usually obtained counsel, is rarely attempted, nor do law enforcement spokesmen claim its urgent necessity as they do for lawyerless interrogation during the investigation stage or after a mere arrest. The very fact that *Massiah's* retroactivity comes up at this late date, some seven years after its rendition, demonstrates that no heavy burden will be put on the administration of criminal justice by affording *Massiah* normal and regular effect. Considering all these factors, the new doctrine of "non-retroactivity" should not be applied to *Massiah*.

Question II:

The record in this case establishes from the State's own evidence that the confession extracted from Petitioner by Officer Langford during the 45 hours he forced his continuous presence on Petitioner was not a free and voluntary expression of Petitioner's will. Officer Langford entered Petitioner's cell disguised as a prisoner with the intent to seek information from Petitioner's lips. He found Petitioner to be sensitive and unable to cope with words (A. 55, 83; T. 370). Petitioner had only a sixth grade education and no prior experience with the police or jails (A. 133-134; T. 464). Officer Langford persistently prodded and probed Petitioner, waking him up at night, trying to make him talk about his case. Petitioner told him that his lawyer had advised him not to talk about his case and repeatedly told Officer Langford that he did not want to talk about it (A. 44-46, 51, 76-77; T. 302, 303, 304, 307, 314-315, 337, 358-359). But Officer Langford persisted, applying psychological pressure, pretending to be made, calling Petitioner crazy and a rape artist, talking about water and drowning until Petitioner's head ached, accusing Petitioner of raping his wife. At the same time he skillfully operated so as to gain Petitioner's confidence, telling elaborate falsehoods about his involvement in the murder of a Chinese man, giving Petitioner his prison food, and letting Petitioner eat his candy bars. Finally, after 12 to 18 hours, Petitioner's

repeatedly expressed resolve not to talk about his case weakened and after midnight early Sunday morning Petitioner broke down and told Officer Langford his story, some 31 hours after Langford entered his cell.

These circumstances are far more coercive and compulsory than those involved in the contemporary cases of *Leyra v. Denno*, 347 U.S. 556 (1954), and *Spano v. New York*, 360 U.S. 315 (1959), where confessions were extracted by trick and deception and the application of psychological pressure. Here, as in those cases, the confession—on an independent review of the record—should be held to be involuntary. Petitioner's statements to Officer Langford about his case were surely not made "in the unfettered exercise of his own will." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). When considered in the totality of the circumstances preceding it, involving flagrant violations of Petitioner's 4th, 5th, and 6th Amendment rights, as well as Florida statutory protections, the State of Florida's methods in extracting a confession from Petitioner and convicting him cannot be said to accord with Due Process under the 14th Amendment.

ARGUMENT

Question I

A. THIS CASE IS NOT DISTINGUISHABLE FROM MASSIAH v. UNITED STATES, 377 U.S. 201 (1964), ON ITS FACTS.

The record in this case shows that after Petitioner was indicted for first degree murder, and had obtained counsel, the State placed a Negro police officer in his cell, posing as a fellow prisoner, for the specific purpose of obtaining information from Petitioner to be used against him. The policeman, falsely claiming to be charged with murder, proceeded to converse with and interrogate Petitioner for hours on end, all the time worming his way into Petitioner's confidence by telling fictitious stories of his own criminal acti-

vities, and by giving Petitioner his food and candy. Petitioner did not want to talk about his case and repeatedly said so. Various psychological techniques were then applied by the decoy to overcome this unwillingness, e.g., accusing Petitioner of raping his deceased wife and of being crazy. Eventually Petitioner's determination not to talk about his case was overcome. After some 12 to 18 hours he began to talk about his case and later "broke down" (as Officer Langford expressed it) and told his story. The evidence so obtained was used over Petitioner's objection against him at his trial.

Massiah v. United States, 377 U.S. 201 (1964), involved the application of Sixth Amendment protections to an indicted accused in a federal case. It held that surreptitious interrogation of an accused in the absence of his counsel after the judicial process had formally begun, i.e., after indictment, was a violation of the accused's right to the assistance of counsel in his defense. Admissions or confessions so obtained are Constitutionally incompetent evidence.

Clearly Petitioner's conviction can not pass muster under the Sixth Amendment as interpreted in *Massiah*. The only possible distinction is that in *Massiah* the accused talked with an ex-confederate who had secretly become a government agent, whereas in Petitioner's case he talked with a policeman disguised as a fellow prisoner, a cell-mate, whom he had not known before. The State of Florida argued below that this element of imposing on a pre-existing confidence between persons already known to each other distinguishes this case from *Massiah*. Respectfully, Petitioner submits this distinction misses the point.

In both *Massiah* and this case, the investigation stage of the proceedings had been completed, at least in the sense that sufficient evidence had been obtained to formally charge the accused with a specific offense. In both, the defendants had been indicted and had obtained counsel. In both, the judicial process had formally begun. In both, the prosecuting government nevertheless schemed to interrogate the accused, by trick and artifice, without his counsel being

present and without his even realizing he was talking to his adversaries.[7] It is the purposeful action of the Government under these circumstances to extract evidence from an accused's own mouth without the protection of his lawyer that constitutes the deprivation of Sixth Amendment rights. It is inducing the formally-charged defendant, unknowingly and unwittingly, to convict himself without the protection of a lawyer that lies at the heart of the Constitutional violation. Relying on a pre-existing confidence is only one way for the Government to achieve this forbidden purpose. Another way is to build up a confidence by deception, as was done here. But in both cases the prosecuting Government set out, by trickery, to do that which the Constitution forbids—extract evidence from one formally accused without benefit of counsel.

As both Courts below seemed to agree in holding that *Massiah* should not be applied retroactively to this 1958 conviction, there is no rational way to distinguish what occurred in this case, in a Constitutional (Sixth Amendment) sense, from what this Court held the Government could not do under the Sixth Amendment in *Massiah*. Especially is this so since the record in this case shows conclusively, from the State's own witness, Archie Langford, that Petitioner did not spontaneously and freely and knowingly volunteer his statements to his prosecutors. It was only after hours of trying to open Petitioner up, only after being told over and over again that Petitioner did not want to talk about his case, that Officer Langford succeeded in breaking down Petitioner. This element of psychological coercion, in fact,

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[7] As this Court quoted from Judge Hays' dissent in the lower Court in *Massiah*, 377 U.S. at 206: "'In this case, Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent.'" This factor, of course, distinguishes both *Massiah* and this case from situations where an accused in jail volunteers a confession to a genuine cell-mate not working for the police, or to a regular visitor not employed by the police as in *Procunier v. Atchley*, 401 U.S. 966 (1971). See *People v. Flores*, 236 Cal. App. 2d 807, 811-812, 46 Cal. Rptr. 412 (1965).

does distinguish this case from *Massiah* where it was almost absent—by making the Sixth Amendment violation here even more flagrant and disturbing, and by adding a Fifth Amendment dimension to the case.

There is another distinction with the same effect worth noting. In *Massiah* at least there was not much question about what the defendant did say to the under-cover police agent. The conversation was wired and another witness heard it. For the same reason there was also no credibility problem in *People v. Flores*, 236 Cal. App.2d 807, 46 Cal. Rptr. 412 (1965). But here a police agent spent a long time with an accused who had no choice but to share his company—alone. The agent then emerges and says the defendant "confessed." The defendant, as did Petitioner here, denies it. What results is a tremendous credibility issue which an accused stands little chance of winning, and then only by waiving his right to remain silent at the trial. The temptation thus present to dishonest, unscrupulous police agents could be well-nigh irresistible. But even with an honest officer there are problems.

For example, in this case there was never any doubt that Petitioner did kill his wife in the sense that any driver in a fatal automobile accident "kills" the person fatally hurt. An honest but over-eager officer, living continuously with the accused and hearing genuine feelings of remorse uncontrollably uttered, could easily without conscious deception construe and repeat such statements as a confession. In such a case, justice and truth-finding would hardly be served.

Here, also, there are some interesting aspects to Officer Langford's testimony. Langford testified positively that he was in Petitioner's cell continuously from Friday evening to late afternoon the following Sunday, with only one short three-minute departure from the cell (A. 72, 75; T. 355-356, 301). Petitioner, on the other hand, testified that Langford was in and out of the cell several times (A. 56; T. 323). This conflict is not particularly important in itself, except that Langford slipped later in his testimony and indi-

cated that, in this regard anyway, Petitioner and not he was telling the truth. Thus Langford later on in his testimony said that he had brought candy bars into the cell with him and that (emphasis added): "*Every time* I went out of the cell, he [Petitioner] would steal one and eat it. Knowing he was stealing *them*, I wouldn't say anything, because I wanted to work right along with him." (A. 48; T. 310) This certainly appears to corroborate Petitioner's testimony that Langford went in and out of the cell several times and to impeach Langford's contrary story and his credibility.

Langford further testified he had absolutely no briefing on the facts of Petitioner's case before entering the cell, not even to the extent of reading Petitioner's two written confessions already extracted in June (A. 54, 72-73; T. 352-355, 320). His only knowledge about the case, he said, came from street rumors he had heard about it in the "Negro area" of Miami (A. 72-75; T. 352-355; 320). Yet Langford also strangely knew, in questioning Petitioner in the cell, that Petitioner's deceased wife was wearing no underpants when she drowned (A. 62, 73-75; T. 333-334, 353-355), and that Petitioner had told him the "correct" date he had purchased the automobile involved (A. 50; T. 313). In short, Langford's testimony that he had *not* been briefed about Petitioner's case, if only by reading Petitioner's prior confessions, before entering Petitioner's cell to seek information, is incredible. Some serious doubts necessarily arise about Mr. Langford's candor and reliability.

In short, the method used here by the State of Florida in extracting a confession from Petitioner in the absence of his counsel is an even more unfair and unreliable one for the accused than was the method used by the federal Government and found to be proscribed by the Sixth Amendment in *Massiah*.

B. THE MASSIAH HOLDING FULLY APPLIES TO STATE CRIMINAL CASES.

Assuming, therefore, that if this were a current federal case, Petitioner's conviction could not stand under the Sixth Amendment, two further questions arise:

(1) Does the Fourteenth Amendment apply Sixth Amendment protections, as construed in *Massiah*, to the States?

(2) If so, do those Sixth Amendment protections, as construed in *Massiah* in 1964, apply to this 1958 conviction (or should *Massiah* be limited to "prospective" effect only)?

The answer to the first question, of course, cuts to the core of a long-standing Constitutional debate about the Fourteenth Amendment and whether it incorporates the Bill of Rights and applies their protections to State action. One who subscribes to the "total incorporation" theory has no difficulty with the answer—of course it is, yes. Likewise, one who subscribes to the polar theory, i.e., that none of the Bill of Rights, as such, is applied to the States but only those concepts therein that in the totality of circumstances of the particular case are essential to Anglo-American canons of fairness, ordered liberty and justice apply through the Due Process Clause to the States—will find both the question and the answer inadequate. (See later discussion of the totality of the circumstances of this case under Question II.) Only those who believe the Fourteenth Amendment differentiates among the Bill of Rights and applies some, but not others, to the States, or applies them in a different, less stringent way to State action as distinguished from Federal action, i.e., partial or selective incorporation, will be troubled with the inquiry and its resolution. See Friendly, *The Bill of Rights As A Code Of Criminal Procedure*, 53 Calif. L. Rev. 929 (1965).

In brief, then, does *Massiah* state a construction of the Sixth Amendment which applies to State conduct through the Fourteenth Amendment? Petitioner submits it does.

Since *Powell v. Alabama*, 287 U.S. 45 (1932), it has been clear that in capital cases a defendant can not be denied the effective aid of counsel by a State at the trial or the pre-trial preparatory stage of the proceedings. The mere formality of a lawyer whose hands are so tied that he becomes more a spectator at his client's preordained conviction than a defender of one only accused and presumed innocent will not do.

Since *Powell* a steady line of cases have consistently afforded full Sixth Amendment right-to-counsel principles to defendants in State capital cases, and expanded the application to lesser, non-petty offenses. *Bute v. Illinois*, 333 U.S. 640, 674 (1948), and earlier cases suggested an absolute requirement of counsel in State capital cases. *Chandler v. Fretag*, 348 U.S. 3 (1954), referred to the right of one to be heard through his own counsel at every step of the proceedings against him as "unqualified." *Townsend v. Burke*, 334 U.S. 736 (1948), and *Moore v. Michigan*, 355 U.S. 155 (1957), emphasized again that the right to counsel in State cases is not confined to representation during the trial on the merits only.

And in the last decade or so the process of full-scale application of Sixth Amendment right-to-counsel principles to State criminal cases has been virtually completed. See *Spano v. New York*, 360 U.S. 315, 324-327 (1959) (concurring opinions of Mr. Justice Douglas and Mr. Justice Stewart); *Ferguson v. Georgia*, 365 U.S. 570 (1961); *Hamilton v. Alabama*, 368 U.S. 52 (1961); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, 372 U.S. 353 (1963); *White v. Maryland*, 373 U.S. 59 (1963); *Doughty v. Maxwell*, 376 U.S. 202 (1964); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966); *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); and *Mempa v. Rhay*, 389 U.S. 128 (1967).

In no case since *Gideon* has a State court defendant been held to enjoy less of a right-to-counsel than his counterpart across the street in the Federal court. Indeed, of all the

guarantees expressed in the Sixth Amendment (and perhaps even the Bill of Rights for that matter), there are fewer reasons to dilute or differentiate the right-to-counsel in State cases from Federal cases in the interests of federalism than there may exist in regard to other Constitutional protections. This is so because the right-to-counsel is the one right without which all the others become empty paper slogans.

This point is aptly illustrated by the case at Bar. Petitioner was held incommunicado for 19 days (June 1 to June 19, 1958). He was not even arrested on a formal charge until June 13th, yet still he was held like a stray cat in a dog pound, completely cut off from the outside world, prey to both his captors and his fellow prisoners. At last he was allowed to telephone out and get a lawyer. The lawyer responded promptly and diligently. He filed a habeas corpus petition and within five days, on June 24, 1958, Petitioner was finally brought before a magistrate for a preliminary hearing—he was finally afforded his first legal right. In short, none of Petitioner's rights—Constitutional, statutory, Federal, State,[8] basic or non-basic—meant anything more than illusory, vapid, broken promises until he secured (perhaps too late) the right to counsel of his choice. To dilute this right is automatically to diminish *all* others. Petitioner submits that there can be no doubt that the Sixth Amendment right-to-counsel, as interpreted in *Massiah*, applies with full vigor by virtue of the 14th Amendment to State criminal cases, and especially to State capital cases. *McLeod v. Ohio*, 381 U.S. 356 (1965), squarely so held, albeit without an opinion. See also *Benton v. Maryland*, 395 U.S. 784 (1969).

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[8]See Sections 901.23 and 901.24, Fla. Stats. Anno. (Fla. Stats. 1957).

C. THE MASSIAH HOLDING SHOULD NOT BE GIVEN LIMITED, PROSPECTIVE EFFECT ONLY; AS WITH GIDEON v. WAINWRIGHT, 372 U.S. 335 (1963), AND OTHER RIGHT-TO-COUNSEL CASES PRECEDING MASSIAH, IT SHOULD BE ACCORDED NORMAL APPLICATION.

Is there any reason, then, that this Sixth Amendment right described in *Massiah* in 1964 should not be applied to Petitioner who was convicted in 1958?. Whatever justifications may exist for not applying fresh constructions of the Constitution "retroactively" in other cases,[9] Petitioner suggests that none of them applies here, and that he is entitled to the same protection of the Sixth Amendment as it was afforded Mr. Massiah.

Basically the considerations underlying the doctrine of non-retroactivity are pragmatic and practical. They come into play, Petitioner submits, *only* when this Court arrives at a Constitutional construction affecting criminal procedure which represents a definite, clear-cut change from past-adjudicated constructions of this Court. When this occurs, there looms the specter of having to retry and perhaps free thousands of already convicted defendants whose guilt was *reliably* determined under past-prevailing, now-rejected Constitutional standards. This consideration could well dampen fresh insights into the meaning and application of an 18th and 19th Century Constitution to late 20th Century circumstances. So the doctrine of non-retroactivity has evolved largely in the past six years to cope with the problem of

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[9]The doctrine of non-retroactivity for certain cases is, of course, itself a novel and fresh Constitutional construction. See Haddad, *"Retroactivity" Should Be Rethought": A Call for the End of the Linkletter Doctrine*, 60 J. Crim. L.C. & P.S. 417 (1969); Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. Chi. L. Rev. 719 (1966). In by-gone days a criminal lawyer's heart used to leap for joy when he discovered a recent case covering his client's problem; now he shudders in fear of "non-retroactivity", and worries that his client will be foreclosed by the law's advance.

when a new Constitutional interpretation *which changes past constructions* will affect past convictions.

As it has evolved, Petitioner submits the doctrine contains at least the following three factors:

(1) For the doctrine to come into play at all, the new Constitutional construction must represent a definitive change, or departure, not merely an expanded application, of past constructions previously considered and adopted by this Court. In every instance, save two, that this Court has held a new construction non-retroactive beginning with *Linkletter v. Walker*, 381 U.S. 618 (1965), the decision held to be non-retroactive had overruled a specific, prior holding to the contrary by this Court.[10] The two excep-

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[10] *Linkletter* involved *Mapp v. Ohio*, 367 U.S. 643 (1961), which overruled *Wolf v. Colorado*, 338 U.S. 25 (1949). *Tehan v. Shott*, 382 U.S. 406 (1966), involved *Griffin v. California*, 380 U.S. 609 (1965), and *Malloy v. Hogan*, 378 U.S. 1 (1964), overruling *Twining v. New Jersey*, 211 U.S. 78 (1908), and *Adamson v. California*, 332 U.S. 46 (1947). *Johnson v. New Jersey*, 384 U.S. 719 (1966), involved *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966), overruling "as no longer binding" (384 U.S. at 731) the cases of *Crooker v. California*, 357 U.S. 433 (1958), and *Cicenia v. Lagay*, 357 U.S. 504 (1958). *Fuller v. Alaska*, 393 U.S. 80 (1968), involved *Lee v. Florida*, 392 U.S. 378 (1968), overruling *Schwartz v. Texas*, 344 U.S. 199 (1952). *Desist v. United States*, 394 U.S. 244 (1969), involved *Katz v. United States*, 389 U.S. 347 (1967), overruling *Goldman v. United States*, 316 U.S. 129 (1942), *Olmstead v. United States*, 277 U.S. 438 (1928), and *On Lee v. United States*, 343 U.S. 747 (1952). *Kaiser v. New York*, 394 U.S. 280 (1969), like *Desist* and *Fuller* involved *Katz v. United States, supra*, and *Lee v. Florida, supra*. *Jenkins v. Delaware*, 395 U.S. 213 (1969), presents the same situation as *Johnson v. New Jersey, supra*. *Williams v. United States*, 401 U.S. 646 (1971), and *Hill v. California*, 401 U.S. 797 (1971), involved *Chimel v. California*, 395 U.S. 752 (1969), overruling *Harris v. United States*, 331 U.S. 145 (1947), and *United States v. Rabinowitz*, 339 U.S. 56 (1950). And *Mackey v. United States*, 401 U.S. 667 (1971), involved *Marchetti v. United States*, 390 U.S. 39 (1968), and *Grosso v. United States*, 390 U.S. 62 (1968), overruling *United States v. Kahriger*, 345 U.S. 22 (1953), and *Lewis v. United States*, 348 U.S. 419 (1955).

tions are *Stovall v. Denno*, 388 U.S. 293 (1967), holding *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967), the line-up cases, to be non-retroactive in effect; and *DeStefano v. Woods*, 392 U.S. 631 (1968), holding *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Bloom v. Illinois*, 391 U.S. 194 (1968), the jury trial cases, non-retroactive.

But in each of these two exceptions, the new construction was a definitive change and a departure from precedent albeit no prior decision of this Court was specifically overruled. Thus, *Duncan v. Louisiana*, 391 U.S. 145 (1968), involved repudiation of earlier, specific statements—powerful, explicit dicta—in prevailing opinions of this Court in *Maxwell v. Dow*, 176 U.S. 581 (1900); *Palko v. Connecticut*, 302 U.S. 319 (1937); and *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

Similarly, the line-up cases involved in *Stovall v. Denno*, *supra*, were based in large part on the earlier overruling in *Gideon v. Wainwright*, 372 U.S. 335 (1963), of the case of *Betts v. Brady*, 316 U.S. 455 (1942). Moreover, they involved express repudiation of the "overwhelming majority of American courts" on the issue, involving a "virtually unanimous weight of authority" which had been fairly relied upon by law enforcement agencies across the Nation. 388 U.S. at 299-300. These two cases (*Wade* and *Gilbert*) were not foreshadowed by earlier decisions and involved a procedure which this Court noted had up until their rendition been uniformly followed by the law enforcement officials of the Federal Government and of all 50 States. 388 U.S. at 299. Surely these cases, *Stovall* and *DeStefano*, as well as all of the others in which non-retroactivity has been held to apply, show clearly that the doctrine is limited to exceptional circumstances as an extraordinary departure from the normal rule.

(2) The new Constitutional construction, even though a definitive change, will still be given normal effect, i.e., applied retroactively, if it significantly involves the reliability

or integrity of the determination of guilt in the past proceedings.[11]

(3) The third factor concerns the effect of retroactive application of the new construction on State and Federal systems of criminal justice. Will retroactive application, because of prevailing practices based on widespread reliance by the police and prosecutors on prior decisions or explicit dicta of this Court, impose a staggering burden of retrials upon the State and Federal governments?

Applying these factors to *Massiah* and the case at Bar, it is respectfully submitted that there is no persuasive reason to give *Massiah* less than ordinary, normal effect, i.e., in regard to *Massiah* there is not sufficient justification to invoke the doctrine of non-retroactivity. *Massiah* overruled no prior decision of this Court; it repudiated no explicit, past dicta; it involved no widespread practice generally followed by law enforcement agencies in fair reliance on virtually unanimous authority of American courts.

Massiah is a direct lineal descendant, as previously discussed, of *Powell v. Alabama*, 287 U.S. 45 (1932); *Bute v. Illinois*, 333 U.S. 640 (1948); *Townsend v. Burke*, 334 U.S.

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[11] See *Griffin v. Illinois*, 351 U.S. 12 (1956) (equal protection clause; right of pauper to free transcript); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (6th & 14th Amendments; right to counsel); *Douglas v. California*, 372 U.S. 353 (1963) (equal protection clause; 6th & 14th Amendments; right to counsel on appeal); *Jackson v. Denno*, 378 U.S. 368 (1964) (5th & 14th Amendments; self-incrimination clause; procedure to determine voluntariness of a confession); *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (6th & 14th Amendments; right to an impartial jury in capital cases); *Roberts v. Russell*, 392 U.S. 293 (1968) (6th & 14th Amendments; right to confrontation); *McConnell v. Rhay*, 393 U.S. 2 (1968) (6th & 14th Amendments; right to counsel); *Arsenault v. Massachusetts*, 393 U.S. 5 (1968) (6th & 14th Amendments; right to counsel); *Berger v. California*, 393 U.S. 314 (1969) (6th & 14th Amendments; right to confrontation); *Ashe v. Swenson*, 397 U.S. 436 (1970) (5th & 14th Amendments; double jeopardy clause); *United States v. United States Coin and Currency*, 401 U.S. 715 (1971) (5th & 14th Amendments; self-incrimination clause).

736 (1948); *Chandler v. Fretag*, 348 U.S. 3 (1954); *Moore v. Michigan*, 355 U.S. 155 (1957); *Spano v. New York*, 360 U.S. 315, 324-327 (concurring opinions); *Hamilton v. Alabama*, 368 U.S. 52 (1961); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, 372 U.S. 353 (1963); and *White v. Maryland*, 373 U.S. 59 (1963). *Massiah* issued from this line of cases with an impeccable pedigree, clearly foreshadowed in 1959 in the *Spano* concurring opinions and insofar as capital cases are concerned particularly anticipated by *Powell v. Alabama*, *supra*,[12] and unblemished by *Betts v. Brady*, 316 U.S. 455 (1942). Certainly the State of Florida was not relying on any decision of this Court, or any dicta either, when it decided to put Officer Langford in Petitioner's cell to extract information from him during the months between his indictment for first degree murder and his trial.

Each of the right-to-counsel cases preceding *Massiah* (insofar as the question has arisen) has been afforded normal, retroactive application. *Massiah* logically falls with this preceding group of decisions, rather than with the following generation of cases involving definitive departure from past precedent as illustrated by *Escobedo*, *Miranda*, *Wade* and *Gilbert*. This is not to disparage these later cases, by any means, but they are simply a different breed of decision from *Massiah*.

Indeed, this Court has already ruled so as to indicate this distinction in *McLeod v. Ohio*, 381 U.S. 356 (1965), where

[12] As this Court stated in *Massiah*, 377 U.S. at 205: "This view no more than reflects a constitutional principle established as long ago as *Powell v. Alabama*, 287 U.S. 45, * * *." Indeed, *Massiah* was specifically anticipated beforehand by the Court of Appeals below in *Lee v. United States*, 322 F.2d 770 (5 Cir. 1963). However, another panel of that Court repudiated *Lee* in *Lyles v. Beto*, 329 F.2d 322 (5 Cir. 1964). This Court then vacated the *Lyles v. Beto* judgment and remanded for consideration in light of *Massiah*. 379 U.S. 648 (1965). On remand the Court of Appeals limited *Massiah* to prospective effect only and adherred to its decision. 363 F.2d 503 (5 Cir. 1966). Further review in this Court was not sought thereafter.

Massiah (1964) was given retroactive effect in reversing (on direct review) a 1961 Ohio murder conviction involving a post-indictment statement obtained in the absence of counsel in 1960.[13] By way of contrast, *Escobedo* and *Miranda* have been held to apply only to initial trials (not retrials) conducted after their dates; and *Wade* and *Gilbert* apply only to cases where the identification confrontation was conducted after their rendition regardless of the trial date. *Johnson v. New Jersey*, 384 U.S. 719 (1966); *Jenkins v. Delaware*, 395 U.S. 213 (1969); *Stovall v. Denno*, 388 U.S. 293 (1967). The *McLeod* case thus squarely places *Massiah* with the earlier line of cases, e.g., *Gideon v. Wainwright*, *supra*;[14] *White v. Maryland*, *supra*; *Hamilton v. Alabama*, *supra*, all of which have been given normal, regular application. *Arsenault v. Massachusetts*, 393 U.S. 5 (1968); see *McConnell v. Rhay*, 393 U.S. 2 (1968).

The second consideration concerns whether the denial of counsel to Petitioner in this case affected the reliability of his conviction. True, Petitioner allegedly "confessed" five times. But this in itself is a rather remarkable circumstance. Usually one or two voluntary confessions will be deemed sufficient by the prosecutor and will satisfy the police. Why did the State of Florida want a *fifth* confession from Petitioner in this case?

Petitioner respectfully submits that one can not read this State court transcript and conclude that, despite the deprivations of Petitioner's right-to-counsel, the jury indubitably arrived at a verdict that reflects the whole truth. In large part this is so because of the already-expressed doubts about

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[13] In a similar case on direct review, California has also applied *Massiah* retroactively in *People v. Flores*, 236 Cal. App. 2d 807, 46 Cal. Rptr. 412 (1965).

[14] To be sure, *Gideon* involved the overruling of *Betts v. Brady*, *supra*, but it also involved a Constitutional protection affecting the reliability of the guilt determination made in its absence. Thus, when Mr. Gideon was granted his Sixth Amendment right-to-counsel and retried, he was found to be innocent.

the reliability of Officer Langford's testimony and the unfair method used here by the State of Florida as distinguished even from the method used in *Massiah* by the United States and by the State of California in *People v. Flores, supra*, or the method used by the State of Ohio in *McLeod v. Ohio, supra*. Presence of counsel, if not circumvented, would have eliminated these defects.

For eleven days of isolated confinement and intensive interrogation, Petitioner—an uneducated young Negro with no friends, no visitors, no counsel, and no prior police experience—stoutly maintained his innocence even while under truth serum and during a lie-detector test. When locked up after the fatal night, he first tried to call his "wife's folks" but was denied permission. Petitioner himself barely escaped from the Miami River with his life. The finger of guilt does not point with unwaving steadiness at Petitioner.

Petitioner was first tried for eleven straight days in June, 1958, in a secret kangaroo court conducted by the Miami police while they blocked him from securing legal advice of his own choice. These kangaroo proceedings zealously continued into July even after formal judicial proceedings had commenced and counsel was retained, but in such a way as to deliberately circumvent and exclude both court and counsel. A jury verdict based almost entirely on evidence so secured can hardly be deemed reliable. Particularly is this true in a capital case involving degrees of homicide. But for the State's deliberate interference with Petitioner's right-to-counsel, he might well have been found innocent or guilty of a lesser degree of homocide than first degree murder.

The very purpose of the *Massiah* interpretation is to ensure "effective representation by counsel" after an accused has been formally charged by indictment. 377 U.S. at 204. Our system contemplates that a judicial trial will follow an indictment, not a secret brain-washing ala the Stalin purge trials of the 1930's.[15] This basic premise of the *Massiah*

[15] See Koestler, *Darkness at Noon*.

ruling distinguishes other decisions involving the Fourth Amendment search and seizure clause (e.g., *Mapp v. Ohio*, *supra*) or decisions effectuating the Fifth Amendment's privilege against self-incrimination. These Fourth and Fifth Amendment rights are equally fundamental to preserving our free society, but they do not concern "the very integrity of the fact-finding process" itself as does the right-to-counsel, which when denied, poses "the clear danger of convicting the innocent." See *Johnson v. New Jersey*, 384 U.S. at 728.

If ever an accused needed a lawyer when held on suspicion of homicide and then charged with murder, Petitioner did. But the State of Florida here repeatedly acted, before indictment and *after*, to deprive Petitioner of the effective aid of counsel he so desperately needed. It can not be said that his conviction is nevertheless reliable.

Finally, in regard to the third consideration, it is quite clear that no widespread, generally accepted practice involving a multitude of cases is here involved. As distinguished from pre-indictment interrogation, which many law enforcement officers feel is indispensable to the fulfillment of their duties,[16] it is only the exceptional case where interrogation after indictment, with the judicial process formally begun, is either deemed necessary or attempted. The reason for this is obvious. After indictment most defendants have lawyers (at least since *Gideon* in 1963). And most lawyers, as Mr. Justice Jackson noted in *Watts v. Indiana*, 338 U.S. 49, 57-62 (1949), will tell their clients "in no uncertain terms to make no statement to police under any circumstances." So post-indictment interrogation is simply not a widespread

[16] See Fred E. Inbau, *Police Interrogation—A Practical Necessity*, 52 J. Crim. L. C. & P. S. 16 (1961), where the author objects vehemently to supplying counsel to arrestees prior to indictment, but concedes that counsel "should be accorded *and provided*" to all defendants in all cases "at the time of trial, or even at the very start of the judicial process."

practice.[17] Questioning a suspect either to absolve or implicate him is commonplace. Questioning an arrestee is a uniform practice. But after indictment, the legitimate function of interrogation becomes extinct.[18] Significantly, the police felt the need (for reasons one can only surmise) for further information from Petitioner in this case after indictment despite days of prior interrogation and four confessions. Yet they did not even attempt a straight-forward approach; they resorted to subterfuge and trickery. Indeed, the very fact that *Massiah's* retroactive effect is still an open question some seven years after its rendition demonstrates that the number of cases involving the problem of post-indictment interrogation in the absence of counsel is not large. In short, no threat either to the safety of the public or to the administration of criminal justice is posed by applying *Massiah* to Petitioner's 1958 conviction.

In summary, *Massiah* was not a definitive departure from prior decisions of this Court. No rule relied upon by law enforcement agencies across the Nation was overturned. The deprivation of counsel affected Petitioner's ability to defend himself and impugned the integrity of his conviction. No burdensome effect on State administration of justice will result from according *Massiah* normal effect. For these reasons, Petitioner respectfully submits there is no justification for denying him the Sixth Amendment protections described in *Massiah* and made applicable to the State of Florida by the Fourteenth Amendment. The non-retroactivity doctrine should not be applied to *Massiah*.

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[17] This of course distinguishes *Massiah* from the line-up cases, *Wade* and *Gilbert*, where post-indictment confrontations *are* common and widespread.

[18] Certainly the *Massiah* rule does not hamper the police in their war on organized crime. A sophisticated criminal will not talk with police before indictment, much less afterwards. It is only the ignorant, inexperienced accused who is protected by *Massiah*.

Question II

A. UPON AN INDEPENDENT REVIEW OF THE TOTALITY OF CIRCUMSTANCES PRECEDING ITS EXTRACTION, PETITIONER'S CONFESSION TO OFFICER LANGFORD WAS CLEARLY AN INVOLUNTARY CONFESSION AND ITS ADMISSION INTO EVIDENCE WAS A VIOLATION OF PETITIONER'S FOURTEENTH AND FIFTH AMENDMENT RIGHTS.

Even if this Court should conclude that *Massiah* is to be applied only prospectively, Petitioner is yet entitled to a consideration of the voluntariness of his confession to Officer Langford in light of the total circumstances of his case. *Johnson v. New Jersey*, 384 U.S. 719 (1966); *Davis v. North Carolina*, 384 U.S. 737 (1966). Such a consideration compels a conclusion that he was not convicted in accordance with the requirements of Due Process under the Fourteenth Amendment. What does the totality view here disclose?

(1) *Violation of Fourth Amendment Rights.*

Petitioner's person was seized on June 1, 1958, and he was held incommunicado for 13 days without being informed of any charge against him and without any formal charge being made. On the 13th day, his captors filed an affidavit with a magistrate and obtained a warrant authorizing his arrest for first degree murder. In short, Petitioner was held for 13 days in violation of the Fourth Amendment's command that:

> "The right of the people to be secure in their persons * * * against unreasonable seizures, shall not be violated. * * *."

During this period he was injected with truth serum, tested on a lie detector, and four confessions plus a "consent" to search his abode were extracted, all without benefit of counsel or magistrate. See *Davis v. Mississippi*, 394 U.S. 721 (1969); *Wong Sun v. United States*, 371 U.S. 471 (1963). While these Fourth Amendment violations in 1958

may not have entailed the exclusion of evidence obtained thereby, their occurrence is surely a circumstance to be considered.

(2) *Violation of Clear State Statutes.*

Florida Statutes (Section 901.23, Fla. Stats. 1957; Sec. 901.23, Fla. Stats. Anno.) required that Petitioner be brought promptly and without unreasonable delay before a magistrate upon his arrest. He was formally arrested on June 13, 1958, yet was not brought before a magistrate until June 24, 1958.

Likewise, Section 901.24, Fla. Stats. 1957 (Sec. 901.24, Fla. Stats. Anno.) had been construed by the Florida courts and the Florida Attorney General as granting one in custody or arrested a right to obtain counsel and to consult with counsel without unreasonable delay. This, of course, was flagrantly violated by the State in Petitioner's case. See *Milton v. Cochran*, 147 So.2d 137, 140-141 (1962); 1946 Op. Atty. Gen. (Fla.) 738 (advising that a sheriff does not have the right to deny a person arrested for a felony the right to have an attorney prior to completion of the investigation).

While these are merely violations of State statutes, the fact they were violated without the semblance of justification is a circumstance relevant to the Due Process inquiry. See *Powell v. Alabama*, 287 U.S. 45 (1932), where the State similarly ignored its own statutory provisions for the protection of the accused and this was deemed a factor to be considered in the Due Process determination.

(3) *Violation of Fifth Amendment Rights.*

In all candor, the voluntariness of Petitioner's first four confessions was not argued or briefed in the Courts below. But evidence concerning them (i.e., the State court transcript) was submitted and received, and they have never before been considered in a federal court. Should all else fail, Petitioner would respectfully ask that his case be remanded

to the District Court for a fuller inquiry into this aspect of his case. And in any event, the circumstances are relevant to a review of the totality of the circumstances leading up to Petitioner's last confession and his conviction.

The evidence concerning these confessions has already been recited in the Statement section of this brief. Suffice it to say that Petitioner does not believe that an independent review of this record, even accepting the testimony of the State's witnesses, can show that he chose to speak the June confessions "in the unfettered exercise of his own will." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964); *Lisenba v. California*, 314 U.S. 219, 241 (1941).

Compared with both pre-1958 and post-1958 decisions of this Court, the circumstances of this case stand out as particularly aggravated. Petitioner was young, impoverished, uneducated, injured, and totally without experience with the police. He was held incommunicado and isolated except for persistent police interrogation for eleven days until he confessed. During that time he saw no friend, relative, or attorney. He was not allowed to make telephone calls. He was given truth serum and lie detector tests.

In *Haley v. Ohio*, 332 U.S. 596, 601 (1948), this Court stated:

> "The Fourteenth Amendment prohibits the police from using the private, secret custody of either man or child as a device for wringing confessions from them."

There a 15-year old boy was questioned by police in relays from midnight to 5 a.m. while held incommunicado without counsel, family, or friends. His confession was ruled involuntary.

A series of cases have held that a confession extracted by the pressure of unrelenting interrogation while holding the accused incommunicado and exerting psychological

coercion will not square with Fourteenth Amendment Due Process standards.[19]

Three cases particularly bear a marked resemblance to the totality of circumstances here involved insofar as the first four confessions are concerned. Each involved uneducated, impoverished Negros in Southern communities. In *Fikes v. Alabama*, 352 U.S. 191 (1957), an accused of low mentality was held in isolation without friend, relative or counsel for five days during which he was intermittently questioned for several hours at a time. *Payne v. Arkansas*, 356 U.S. 560 (1958), involved a 19 year old Negro with a fifth grade education, held incommunicado for three days with little food and in fear of mob violence. *Davis v. North Carolina*, 384 U.S. 737 (1966), concerned an adult Negro with a third or fourth grade education held incommunicado for 16 days and interrogated intermittently every day. In each case, on an independent review of the record and considering all of the circumstances, this Court concluded that the extracted confession was not the product of the defendant's free and voluntary will.

Here, the question of whether Petitioner's first four confessions were voluntary or not under Fourteenth Amendment standards may not be squarely presented, but clearly the circumstances which make that question stand out starkly in this record are part of the total circumstances before this Court in considering whether the entire treat-

[19] *Watts v. Indiana*, 338 U.S. 49, 53 (1949) (5 days of constant questioning in relays); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (36 hours of relay interrogation while held incommunicado); *Chambers v. Florida*, 309 U.S. 227 (1940) (5 days of continued interrogation while held incommunicado; fear of lynching or mob violence used by police); *Malinski v. New York*, 324 U.S. 401 (1945) (interrogation while held incommunicado, stripped naked and in fear of a shellacking); *Colombe v. Connecticut*, 367 U.S. 568 (1961) (prolonged detention with systematic interrogation 3 hours per day); *Haynes v. Washington*, 373 U.S. 503 (1963) (defendant held incommunicado for 16 hours, refused permission to telephone his wife); *Clewis v. Texas*, 386 U.S. 707 (1967) (defendant held incommunicado 38 hours while ill, without sleep or counsel).

ment accorded Petitioner by the State leading up to his fifth confession and conviction accorded with standards of civilized decency and ordered liberty protected by the Fourteenth Amendment.

In regard to the voluntariness of Petitioner's fifth confession in July, 1958, to Officer Langford—which was squarely presented and ruled upon in the Courts below—the facts again need not be restated. It is clear from Officer Langford's own testimony that the pressure of persistent questioning going on for hours, day and night—even waking Petitioner up in the middle of the night (A. 55, 70, 79; T. 321, 347, 362)—plus the use of coercive psychological techniques[20] eventually stripped Petitioner of his unfettered, clear, and repeatedly expressed will not to talk about his case. Langford by no means was just a listening post, a passive ear recording Petitioner's noises. He forced Petitioner to the point of a "break down" as he himself described it (A. 47; T. 309).

Few people could withstand the continuous prying, prodding, and prompting of a trained and skilled interrogator intimately sharing a confined, cramped cell day and night for 45 hours. Petitioner, with his sixth grade Mississippi education, never in jail before, lasted 12 to 18 hours. At that point his will to follow his attorney's advice not to discuss his case was overcome, but it was still not until early Sunday morning, in the wee hours before dawn and after some 30 hours of being forced to share Officer Langford's company, that he finally "broke down" and confessed according to Officer Langford. It can not be fairly said his "confession" was the exercise of an unfettered will.

In *Leyra v. Denno*, 347 U.S. 556 (1954), the police used a psychiatrist, posing as a nose doctor brought in to treat.

[20] E.g., talking about drowning and water until it made Petitioner's headache, feigning madness, accusing Petitioner of raping his wife, accusing Petitioner of being crazy, all interspersed with calculated actions to gain Petitioner's confidence (see pp. 13-14, Statement of the Facts, *supra*).

defendant's sinus condition, to extract a confession. And in *Spano v. New York*, 360 U.S. 315 (1959), a fledging police officer who was a friend of the accused was induced to tell him falsehoods and exert psychological pressure; after refusing three times, the accused succumbed to his friend's prevarications and agreed to confess. In both cases the confession was held not to be the product of a free and voluntary will.

Surely under these contemporary standards Petitioner's statements to Officer Langford after 12 to 18 hours of repeatedly telling him he did not want to discuss his case (A. 44-46, 76-77; T. 303, 304, 307, 337, 358-359), can not be deemed free and voluntary expressions under the Fifth and Fourteenth Amendments.

(4) *Violation of Sixth Amendment Rights.*

Even if *Massiah* is deemed to apply prospectively only, the 1958 violations of Petitioner's Sixth Amendment right-to-counsel remain a circumstance to be here considered in the context of Due Process under the Fourteenth Amendment. There is no need to repeat their description now. Suffice it to say, Petitioner was totally deprived of counsel of his choice for 19 days from June 1 to June 19th.

This is not a case involving the failure to supply counsel to an indigent. Once allowed to make a telephone call, Petitioner got his own lawyer. Rather, this is a case where the State for days on end blocked Petitioner from obtaining any legal assistance whatsoever at a time when he desperately needed it. To advise an accused of his right to counsel, as Detective Holmes testified he did, but prevent him from calling one, as happened here, is a cruel mockery of the Sixth Amendment. See *Chandler v. Fretag*, 348 U.S. 3 (1954); *Ferguson v. Georgia*, 365 U.S. 570 (1961)

There followed on top of this the July scheme of the State to circumvent Petitioner's lawyer, finally obtained, by placing a disguised decoy in Petitioner's cell to extract "information" from his lips.

(5) *Summary*

On the totality of all of these circumstances–Constitutional violations pyramided onto statutory violations–Petitioner submits that this Court in 1958 (had it then reviewed the case) would not have concluded that Petitioner's "confession" to Officer Langford was a voluntary expression of his unfettered will nor that Petitioner's conviction met the standards of Due Process under the Fourteenth, Sixth, Fifth, and Fourth Amendments. Petitioner asks that the Court so rule at this time.

CONCLUSION

For the reasons stated, Petitioner respectfully prays that the judgment below be reversed and that this case be remanded to the District Court with instructions to grant the petition for habeas corpus.

Respectfully submitted,

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